



September 20, 2017

Hilary Malawer
Assistant General Counsel
Office of the General Counsel
United States Department of Education
400 Maryland Avenue, SW
Room 6E231
Washington, DC 20202

Re: Docket ID ED-2017-OS-0074

Dear Ms. Malawer:

The National Federation of the Blind submits the following response to the request for comments by the United States Department of Education, herein after the "Department," regarding its evaluation of existing regulations pursuant to Executive Order 13777, Enforcing the Regulatory Reform Agenda. Additionally, the National Federation of the Blind fully supports and endorses the comments submitted by the National Council of State Agencies for the Blind (NCSAB) in response to this request as well. The National Federation of the Blind is the oldest and largest organization of blind Americans, with fifty-two affiliates, fifty thousand members, and over seven hundred local chapters nationwide. Through our educational, entrepreneurial, and advocacy programs, the National Federation of the Blind equips blind individuals with the skills and confidence necessary to live the lives we want. As the largest vehicle for collective action for the blind in the United States, our membership is comprised of blind students, blind parents, parents of blind children, blind merchants, and related professionals. As a result, securing equal educational and employment opportunities for blind individuals across the country is a key component of our work, and through the issuance of its regulatory and sub-regulatory guidance, the United States Department of Education has been a critical partner in that effort.

The National Federation of the Blind relies on the following laws and their implementing regulations to ensure that blind students are receiving a high-quality "free appropriate public education," to assist parents of blind children in combatting societal low-expectations for blind students, to assist blind job-seekers to receive the training necessary to be an active part of the American workforce, and to promote small business development opportunities for blind entrepreneurs:

- Civil Rights Act of 1964;
- Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA);
- Individuals with Disabilities Education Act (IDEA);
- Higher Education Act;
- Randolph-Sheppard Act;
- Section 504 of the Rehabilitation Act of 1973;
- Workforce Innovation and Opportunity Act (WIOA) amending Title I of the Rehabilitation Act of 1973; and
- Americans with Disabilities Act (ADA).

We urge, in the strongest terms possible, the Department to retain the regulations, and any subsequent guidance documents, and/or frequently asked questions (FAQ), the Department has issued pursuant to these laws. We strongly oppose any effort to repeal, in part or as a whole, the regulations, guidance documents, and/or FAQ, issued pursuant to these laws. In complying with executive order 13777, the Department must be vigilant so as not to erode the gains students with disabilities have made in public, private, and postsecondary education; nor limit the entrepreneurial spirit of the blind merchants who are achieving economic security for themselves and their families, while simultaneously spurring job creation and contributing as an additional source of federal, state, and local tax revenue for the communities they serve.

The 1974 passage of the Education for all Handicapped Children Act, and its subsequent 1990 amendment as the Individuals with Disabilities Education Act (IDEA), (20 U.S.C § 1400 et seq.) continues to be one of the most important legislative achievements for students with disabilities, parents, and related professionals. The Department's work to interpret Congress's intent and to issue regulatory guidance for the implementation of the IDEA has been critical to achieving Congress's goal of providing students with disabilities with a "free appropriate public education" in the "least restrictive environment." Likewise, the passage of the Randolph-Sheppard Act of 1936, (20 U.S.C. § 107 et seq.) has expanded entrepreneurial opportunities for blind individuals. With a 72 percent unemployment rate among the working-age blind in the United States,¹ the employment opportunities available through the Randolph-Sheppard Program are critical to the economic independence and security of the blind business-owners who are thriving under this program. Additionally, the National Federation of the Blind supports and endorses the Department's regulations implementing WIOA, as well as the Rehabilitation Service Administration's (RSA) associated Frequently Asked Questions.

The remainder of our comments are broken into five sections in which we discuss areas where the Department can provide clarification to existing regulatory guidance, improve existing regulatory guidance through modifications, or where the Department should protect the existing high-quality guidance it has already issued. Those sections include the following:

- I. Regarding the need for State Adherence to Minimum Federally-Established Eligibility Requirements for Special Education Services under the Disability Category of "Visual Impairment Including Blindness"
- II. Regarding the Inclusion of the National Reading Media Assessment (NRMA) in Future Office for Special Education Programs (OSEP) Guidance Documents
- III. Regarding Regulations Applicable to the Operation of Vending on Federal and Other Property Pursuant to the Randolph-Sheppard Act
- IV. Regarding the regulations issued pursuant to the Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act of 2014, and a recent letter to the Secretary of education regarding these regulations

Additionally, Section V of these comments consists of specific guidance documents issued by OSEP that the National Federation of the Blind has identified as critical in assisting parents, advocates, and professionals in ensuring that blind students receive a "free appropriate public education." The National Federation of the Blind urges the Department to retain these documents as currently drafted.

I. The need for State Adherence to Minimum Federally-Established Eligibility Requirements for Special Education Services under the Disability Category of "Visual Impairment Including Blindness"

In 1997, the Department updated the IDEA regulations to better define the term "visual impairment including blindness," to mean "an impairment in vision that, even with correction, adversely affects a child's

educational performance. The term includes both partial sight and blindness.”² This definition was retained in subsequent regulatory IDEA amendments and remains in place today.³ Moreover, IDEA implementing regulations require that states determine “whether a child is a child with a disability, as defined in Sec. 300.8.”⁴

Some states,⁵ however, have created criteria in addition to that set forth through the federal definition of “visual impairment including blindness,” which is resulting in children who would otherwise qualify for special education services under the federal definition not receiving services based upon the state imposed⁶ requirements. As an advocate for equal access to educational opportunities, the National Federation of the Blind is opposed to any state requirements that fall outside of the minimum eligibility requirements set forth in the Individuals with Disabilities Education Act.

Often, the state-imposed requirements that fall outside of the scope of eligibility Congress has identified for children with “visual impairments including blindness” through the IDEA, include⁷ field of vision and/or acuity requirements that are otherwise not required by federal law or regulations.

OSEP’s most recent memo, OSEP 17-05,⁸ acknowledges this problem is ongoing by stating the following:

It has come to our attention that some States direct their LEAs to implement a two-step process when addressing whether a child suspected of having a visual impairment may be eligible for special education and related services under the IDEA. During the first step, the eligibility team is required to reach a decision as to whether the child has one or more of the conditions that the State has identified and believes could affect a child’s vision functioning. Examples of such conditions might include: the child has a reduced visual field to 50 degrees or less in the better eye; the child has been diagnosed with cortical visual impairment; or the child has a diagnosis of a degenerative condition that is likely to result in a significant loss of vision in the future. During the second step, the eligibility team determines the extent that it should proceed further and examine whether the condition adversely affects the child’s educational performance. However, if the eligibility team were to conclude the child’s vision difficulties do not fall within one of the State’s listed criteria or conditions, the eligibility team would not consider whether the child’s visual functioning adversely affects his or her educational performance. Such a practice is inconsistent with the IDEA.

We commend the Department for highlighting this systemic problem, and providing clarity with regards to the Department’s interpretation of this ill-advised, bifurcated eligibility determination process some states have already implemented. However, the Department should also amend OSEP’s “Dear Colleague Letter on Free and Appropriate Public Education (FAPE),”⁹ to clarify state educational agencies responsibility under 34 C.F.R. § 300.306(a)(1) to “determine whether the child is a child with a disability” pursuant to the federal definition. The Department should further urge state education agencies to strike any additional state-specific requirements that are inconsistent with these federal regulations, and should cease from approving state special education plans that include such requirements.

II. Regarding the Inclusion of the National Reading Media Assessment in Future Office for Special Education Guidance Documents

Over our seventy-seven year history, the National Federation of the Blind has been, and continues to be, a leading resource for the education of blind children in the United States. As a staunch advocate for instruction in Braille and nonvisual techniques, including the Structured Discovery cane travel method,¹⁰ the National Federation of the Blind leads the blindness field by developing cutting-edge evaluation and educational methods and techniques to better serve blind students.

In 2009, the National Federation of the Blind Jernigan Institute, in conjunction with the Professional Development and Research Institute on Blindness at Louisiana Tech University, formed a committee to study the evaluation for appropriate reading medium or media of blind students.¹¹ The committee was comprised of experienced and certified teachers of blind students (TBS), professors in TBS preparation programs, specialists in deafblindness and multiple disabilities, and experienced parent advocates. Their efforts resulted in the development and testing of a new evaluation instrument targeted specifically towards students with “low vision” to determine their appropriate reading medium or media. For the purpose of this evaluation instrument, students with “low vision” are considered to be “youth from preschool to twelfth grade who have enough functional vision to identify print letters or shapes by sight.”¹²

In their introductory material, the developers of the NRMA state the following:

Accurate identification of the appropriate reading medium/media for a student who is blind/visually impaired depends upon expectations of the student when using that medium. Said another way, the development of an assessment tool has a great deal to do with what is being measured. Each student is an individual and under the Individuals with Disabilities Education Act (IDEA), as well as within best practice, the educational curriculum must be “individualized.”

However, for the blind/visually impaired student, the question to be answered in regard to reading medium involves “literacy” and student “success.” For visually impaired youth, the best criterion against which to measure literacy and success is the performance of sighted peers of similar intellectual ability. The need arises, then, for a valid, standardized measuring tool that will yield a quantitative measure of otherwise qualitative factors.

As a result, this assessment departs from existing learning media assessments in several critical ways. Where existing assessments operate by obtaining considerable information about the individual youth’s performance in a variety of situations, under a variety of conditions, with varying types of materials, in varying time frames, this assessment gathers only information pertinent to reading and writing; gathers these data under standardized conditions; and bases evaluation of the student’s reading “efficiency” and the appropriateness of the reading medium on what would be expected of sighted students of similar intellectual functioning in terms of reading speed, accuracy, and duration.¹³

Since it’s unveiling, the National Reading Media Assessment has assisted parents, teachers of blind students, and administrators alike to more accurately determine the appropriate reading medium or media for blind students. In 2012, Mississippi became the first state in the nation to require teachers of blind students to, at a minimum, include a research-based assessment in their determination of whether students’ primary reading media should be print, Braille or both.¹⁴ In evaluating the impact of the Mississippi state legislature’s decision four years later, Casey West Robertson, (a teacher of blind students in the state,) reflects upon some statistics gathered by other teachers of blind students in the state.

Out of forty-one assessments:

- 10 students were recommended to use large print as their primary reading medium;
- 14 students were recommended to use Braille as their primary reading medium;
- 17 students were recommended for dual-media (large print and Braille) instruction.¹⁵

After seeing the benefits that Mississippi gained from requiring, at a minimum, the inclusion of a research-based, standardized assessment in the determination of a blind student’s appropriate reading medium or media, other states have begun to explore similar legislative solutions. And, as more and more teachers of blind students become familiarized with the usefulness of this assessment, its usability continues to

increase. Thus OSEP should include the NRMA when providing guidance regarding the evaluation of children suspected of having a visual impairment including blindness. Furthermore, the Department should amend OSEP memo 17-05: "Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act,"¹⁶ to include the National Reading Media Assessment under the heading titled "Evaluation to Determine Whether the Child's Visual Impairment Adversely Affects Educational Performance"

III. Regulations Applicable to the Operation of Vending on Federal and Other Property Pursuant to the Randolph-Sheppard Act

As stated in the introductory section of our comments, the National Federation of the Blind strongly supports the Randolph-Sheppard program. For over eighty-one years, the Randolph-Sheppard program has allowed blind entrepreneurs to become self-sufficient, tax-paying members of society. The National Association of Blind Merchants,¹⁷ a division of the National Federation of the Blind, serves as an advocacy and support group of blind persons employed in self-employment work or through the Randolph-Sheppard program. To continue expanding the program's reach, the Department should consider making some modifications to the regulations it has issued pursuant to the Randolph-Sheppard Act.

The regulations at 34 C.F.R. 395.14(b)(1) establish that the "State Committee of Blind Vendors" shall "actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program," but the regulations fail to define¹⁸ the term "active participation." In the absence of federal guidance on the definition of this term, states are left to decide for themselves exactly how they will choose to interpret it, leading to mixed results in the participation of the Committee of Blind Vendors. In the most egregious cases, the Committee of Blind Vendors is simply looked upon as being an advisory body, violating Congress's intent for the committee.

We strongly urge the Department to amend the Randolph-Sheppard Act regulations, Definitions Section¹⁹ to include a uniform definition for the term "active participation." We propose the following language:

Active Participation—the term "active participation" means an ongoing process of negotiations between The State Licensing Agency (SLA), and The State Committee of Blind Vendors as described in 34 C.F.R. 395.14 to achieve joint planning and approval of program policies, standards and procedures affecting the overall operation of the vending facilities program, prior to their implementation by the SLA. The implementation of agreed-upon policies, standards and procedures affecting the overall operation of the vending facilities program, shall be subject to review by the Committee. It is understood that the Agency bears final authority and responsibility for the administration and operation of the vending facilities program, including the assurance of continuing, active participation with the Committee.

Although there is currently no uniform definition of the term "active participation," the National Association of Blind Merchants, the National Council of State Agencies for the Blind, the Randolph-Sheppard Vendors of America, and the RSA, have agreed in the past to the terms of the proposed definition we have included in these comments.

The regulations at 34 C.F.R. 395.31(d) state in part, "The provisions of paragraphs (a) and (b) of this section shall also not apply when fewer than 100 Federal Government employees are or will be located during normal working hours in the building to be acquired or otherwise occupied or when such building contains less than 15,000 square feet of interior space to be utilized for Federal Government purposes in the case of buildings in which services are to be provided to the public." This provision is frequently

misconstrued by federal agencies who believe that the Randolph-Sheppard priority does not apply to such facilities with respect to vending on these premises altogether.

In instances in which such facilities meet the criteria set forth in 34.C.F.R. 395.31(d), but who otherwise meet the requirements for a “satisfactory site”²⁰ the priority for blind vendors under 20 U.S.C. § 107 is not being honored. The Department should issue guidance clarifying its interpretation of 34 C.F.R. 395.31(d), and the applicability of the priority in such instances.

34 C.F.R. 395.33 specifically deals with the “Operation of Cafeterias by Blind Vendors,” which discusses the priority to be given to blind vendors and sets forth what a government agency must do to comply with the RSA. This is an issue that is frequently brought before arbitration²¹ pursuant to 20 U.S.C. § 107(d)(1). In most of the cases brought before arbitration, the Department of Defense (DoD) often is the federal agency in question. The misunderstanding regarding the application of 34 C.F.R. 395.33 stems from the 2006 Joint Statement of Policy²² that was developed by the Department of Education, Department of Defense, and the Committee for Purchase from the Blind and Physically Handicapped (now known as AbilityOne). The Department of Education did not promulgate the Joint Policy Statement into regulations once it realized it violated the Randolph-Sheppard Act.

However, since the publication of the 2006 statement, the DoD has continuously awarded military dining contracts to parties outside of the Randolph-Sheppard priority, without applying the priority for blind vendors as required by law. When brought before an arbitration panel, these cases are frequently won by Randolph-Sheppard program participants. The courts^{23,24} have clearly established that this priority applies to military dining contracts, and today approximately forty-five blind entrepreneurs successfully operate these contracts across the country. However, in June 2016, DoD published draft regulations that would effectively eliminate the priority for blind entrepreneurs to operate these contracts in the future. These regulations were intended to implement the 2006 Joint Statement of Policy previously mentioned.

The National Federation of the Blind maintains that neither the Department of Defense, nor any other federal agency outside of the United States Department of Education, has Congressional²⁵ authority to promulgate regulations pursuant to the Randolph-Sheppard Act. In an effort to provide clarification to the application of 34 C.F.R. 395.33, the Department should disavow itself of the 2006 Joint Statement of Policy by promulgating rules related to cafeteria service that is consistent with the Randolph-Sheppard Act. The rules should clarify that the priority applies to all functions of cafeteria operations, collectively or individually, including the management and supervision of staff, inventory control, food preparation, cooking, serving food, dish washing, bussing the tables, mopping the floors, running the register, and any other services pertaining to the operation of a cafeteria. In doing so, the Department will eliminate the unnecessary confusion the 2006 Joint Statement of Policy created, and provide clarity to the application of the priority for blind vendors under the Randolph-Sheppard Act as it relates to the operation of cafeterias.

Finally, the regulations at 34 C.F.R. §361.4(d) make the requirements under 2 C.F.R. Part 200 (Uniform Administrative Regulations) applicable to the State Vocational Rehabilitation (VR) Services Program. During recent monitoring reviews by the RSA, State VR agencies have been advised that the prior approval requirements under 2 C.F.R. §200.407 now apply to the State VR Program. In the past 34 C.F.R. Part 80 applied instead. Part 80 has expired and was replaced by 2 C.F.R. Part 200. Under Part 80, the Office of Special Education and Rehabilitative Services (OSERS) and RSA had received an exemption to the prior approval requirements.

Seeking prior approval for expenditures greater than \$5,000, and in some cases an even lower threshold, places a significant administrative burden on both State VR agencies and RSA. The amount of paperwork and the potential for significant delays in the ability to spend VR funds on capital expenditures and other items requiring prior approval will prove to be a significant and unnecessary burden for State VR agencies.

For example, seeking prior approval for the purchase of auxiliary aids and devices may significantly delay the provision of needed services and equipment for individuals with significant disabilities. This delay could be seen as a violation of the Americans with Disabilities Act or section 504 of the Rehabilitation Act as it would be a delay in providing a reasonable accommodation for individuals served by the VR agency.

In addition, the need for prior approval poses a tremendous burden and delay to blind entrepreneurs operating vending facilities under the Randolph-Sheppard Program. For example, having to seek prior approval for expenditures may harm a blind vendor if there is a need to replace equipment immediately to keep the vending facility in operation. State VR agencies can utilize VR funding to provide management services to blind vendors under the Randolph-Sheppard program.

It should also be noted that the threshold for prior approval is even lower for other expenses such as travel for the members of the State Rehabilitation Council²⁶ and for purchasing memberships in community organizations.²⁷ There is no dollar threshold for these expenses, and seeking prior approval for these clearly allowable costs poses a serious administrative burden on the State VR agency.

The National Federation of the Blind supports NCSAB's recommendation that the Department seek an exemption to 2 C.F.R. §200.407 for OSERS/RSA programs as a matter of reducing administrative burden.

IV. The regulations issued pursuant to the Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act of 2014, and a recent letter to the Secretary of Education regarding these regulations

On July 28, 2017, Congresswoman Kristi Noem along with forty-four other members of the United States House of Representatives sent a letter to the Secretary of Education regarding the regulations the Department issued pursuant to the Rehabilitation Act, as amended by WIOA, specifically regarding the Rehabilitation Services Administration's FAQ and its definition of "competitive integrated employment." The following is the National Federation of the Blind's response to Congresswoman Noem's letter for the Secretary's consideration. This letter was also transmitted by separate cover to the Secretary, the Office of General Counsel, and OSERS senior level staff in the US Department of Education. It was also carbon copied to all forty-five members of Congress who signed on to the letter dated July 28, 2017.

August 22, 2017

*The Honorable Betsy DeVos
Secretary
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202*

Re: Letter from Representative Kristi Noem et al. to Secretary DeVos dated July 28, 2017

Dear Secretary DeVos:

The undersigned disability organizations support and endorse the Department of Education's regulations implementing the Workforce Innovation and Opportunity Act of 2014 (WIOA), which took effect on August 19, 2016, and the Rehabilitation Services Administration's (RSA) FAQ with respect to the definition of competitive integrated employment. We believe these items are consistent with congressional intent and should not be amended. Likewise, we submit that state policies disqualifying AbilityOne from state referrals are consistent with the goals of WIOA, other federal disability laws that promote integration, and the United States Supreme Court's decision in Olmstead. The following analysis will illustrate that the appropriate

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solution is not to rescind the WIOA regulations but rather for Congress to amend the current statutes governing the AbilityOne program.

We recently received a copy of a letter from Representative Kristi Noem et al. (hereinafter referred to throughout this analysis as “the letter”) concerning the Rehabilitation Act, as amended by the Workforce Innovation and Opportunity Act of 2014. First and foremost, we applaud Congress’s bipartisan effort to enact this law, as well as all federal agencies that promulgated regulations to achieve better jobs for Americans with disabilities. Specifically, this analysis will address the following statements from the letter:

- The RSA created a definition of “integrated settings” in the context of competitive integrated employment through its promulgating regulations and sub-regulatory guidance related to WIOA.
- The RSA promulgated a number of factors that disqualify an employer from state referral and those factors are found in the RSA’s FAQ document on its website.
- The AbilityOne program receives allowances under the Fair Labor Standards Act for compensatory subminimum wages.
- The AbilityOne program complies with a mandated direct labor-hour ratio of persons with disabilities.
- The RSA’s disqualifying criteria are nowhere to be found within the WIOA law.
- The RSA’s disqualifying criteria have resulted in AbilityOne organizations experiencing difficulty in placing individuals in jobs around the country.
- State vocational rehabilitation agencies have stopped referring individuals with disabilities to AbilityOne employment.
- States have implemented policies disqualifying AbilityOne from state referrals.

Part I of this analysis provides the groundwork of how Congress’s goals have systematically shifted away from the segregated employment model in 1938 to the competitive integrated employment model in 2014. In Part II, it describes how the AbilityOne program is inconsistent with Congress’s current employment objective to achieve competitive integrated employment. Finally, Part III provides a solution to reconcile the apparent conflict between the AbilityOne program and WIOA.

I. Legislation Regarding Employment of People with Disabilities Has Been Moving Away From Sheltered Employment Towards Competitive Integrated Employment Over the Last Several Decades

A. Legislative intent of Section 14(c) of the Fair Labor Standards Act and the Javits-Wagner-O’Day Act

Congress has contemplated ideas to secure jobs for people with disabilities since the mid-1800s; however legislation did not develop until the 1930s, at a time when most jobs were found in the manufacturing business. At that time, society believed that employees with disabilities could not meet the production standards of nondisabled employees.²⁸ In 1938, Congress enacted the Fair Labor Standards Act, but created an exception that allowed the Secretary of Labor to grant a Special Wage Certificate to employers that permitted them to pay their disabled employees subminimum wage commensurate with the individual’s productivity level.²⁹

That same year, in another attempt to address the employment dilemma, Congress established a committee to determine the fair market value of commodities manufactured by the blind offered for sale to the federal government by any nonprofit agency.³⁰ Today, this committee, known as AbilityOne, is governed by the Javits-Wagner-O’Day Act³¹ to serve both the blind and people with severe disabilities.³²

AbilityOne publishes a list of commodities and services provided by “qualified nonprofit agencies” for the blind and other individuals with severe disabilities that the committee determines are suitable for procurement by the government.³³

Reflecting on the social and economic effects of programs like 14(c) and AbilityOne, Congress acknowledged in numerous Congressional documents that the environment it fostered and funded only resulted in segregated employment.³⁴ Consequently, Congress recognized that the 14(c) and AbilityOne programs brought only limited success. Despite its efforts in the 1930s, Congress still found that the isolation and segregation of people with disabilities was a pervasive social problem in critical areas such as employment.^{35 36}

B. “Integrated settings,” as used in WIOA’s implementing regulations, are consistent with longstanding federal law, policy, and case law

Congress recognized that past legislative efforts led to an unintended consequence, that consequence being that graduates from “sheltered employment” were unable to transition into mainstream employment.³⁷ In response, Congress took a new approach and enacted both the Rehabilitation Act of 1973³⁸ and the Americans with Disabilities Act of 1990³⁹ with intent to prohibit discrimination based on disability.⁴⁰ This was Congress’s attempt to counter past legislation and integrate people with disabilities into society.⁴¹ As the United States Supreme Court explained in 1999 in its landmark decision in *Olmstead v. L.C. ex rel. Zimring*, “[u]njustified isolation of the disabled” amounts to discrimination because institutional placement “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “severely diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁴² In its decision, the Court found that Title II of the Americans with Disabilities Act prescribed a state’s duty to counter discrimination.⁴³ It also upheld Congress’s integration mandate stating that state programs, services, and activities must be administered “in the most integrated setting appropriate.”⁴⁴ In doing so, the Court defined the “most integrated setting” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”⁴⁵

The *Olmstead* decision has been applied to state services like vocational rehabilitation and prohibits states from referring people with disabilities to segregated employment settings.⁴⁶ Leading this initiative, the United States Department of Justice’s Civil Rights Division (DOJ), has pursued nearly fifty cases to enforce and expand *Olmstead*.⁴⁷ It has also created guidelines on the enforcement of Congress’s integration mandate, defining the “most integrated settings” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible...[and] settings that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities.”⁴⁸ By contrast, segregated settings often have qualities of an institutional nature including: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals’ ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.⁴⁹

The DOJ’s enforcement litigation applying the “most integrated setting” standard includes two challenges to the overuse of sheltered employment for people with disabilities: *Lane v. Kitzhaber*⁵⁰ and *United States v. Rhode Island*.⁵¹ In *Lane*, plaintiffs alleged that Oregon failed to provide training and services that would allow individuals with intellectual disabilities work in mainstream, rather than sheltered, employment settings.⁵² The DOJ intervened and alleged that Oregon administered employment, rehabilitation, vocational, and education service systems “in a manner that unnecessarily causes qualified individuals with

disabilities to be denied the benefit of [these systems] in the most integrated setting appropriate to their needs,” and that the state failed to modify the systems to avoid such discrimination.⁵³ The DOJ noted that Oregon’s Office of Vocational and Rehabilitation Services, tasked with formulating individualized employment plans, was failing people with disabilities by “administer[ing] a system of vocational assessments that [was] largely inappropriate for individuals with” intellectual or developmental disabilities.⁵⁴ The parties entered into a settlement agreement, in which Oregon agreed to transition 1,115 sheltered workshop employees into competitive, integrated employment over seven years, and to provide at least 4,900 youth with disabilities supported employment services to prepare them for competitive employment.⁵⁵

In another employment case, the DOJ alleged that Rhode Island and the city of Providence violated Title II by failing to administer their supported employment and special education programs in accordance with the ADA integration mandate.⁵⁶ The DOJ alleged that Rhode Island sent students with disabilities from its special education training program to its largest sheltered workshop, Training Thru Placement (TTP), in unnecessarily high numbers, and that TTP participants then remained in the workshop for decades, with few participants ever moving on to integrated employment.⁵⁷ In an interim settlement agreement, the parties agreed that new placements would no longer be made to TTP⁵⁸ and to gradually increase placements in integrated mainstream employment.⁵⁹

The letter incorrectly states that the RSA created a definition of “integrated settings” in the context of competitive integrated employment.⁶⁰ In fact, as described above, “integrated settings” can be found used consistently in other federal regulations and policies well predating the WIOA regulations and FAQ.⁶¹ Likewise, the United States Supreme Court upheld the ADA’s “integration mandate” in 1999 in its *Olmstead* decision, over a dozen years prior to the passage of WIOA and its implementing regulations. Therefore, RSA did not promulgate a new definition of “integrated setting,” but rather adopted a longstanding definition as used in other federal regulations, policies, and case law. Applying *Olmstead*’s definition in this analysis, as was previously done in the *Lane* and *Rhode Island* cases, allows the conclusion that vocational rehabilitation services must be provided in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.⁶²

The letter states that state vocational rehabilitation agencies have stopped referring individuals with disabilities to AbilityOne employment.⁶³ As will be discussed later in this analysis in more depth, the AbilityOne program is currently not integrated.⁶⁴ Turning to federal regulations, policies, and case law for guidance leads to the conclusion that state policies terminating referrals to the AbilityOne program are consistent with states’ duties to counter discrimination under Title II and that referrals to these program would effectively be acts of endorsing discrimination.⁶⁵

The momentum building towards integration did not stop after the Americans with Disabilities Act and the Rehabilitation Act however. With the foundation for desegregation in place and the Supreme Court in the midst of hearing arguments in the *Olmstead* case at the time, Congress enacted the Workforce Investment Act of 1998 (WIA).⁶⁶ Under WIA, all programs, projects, and activities receiving assistance under [the Rehabilitation] Act were required to be carried out in a manner consistent with the principles of inclusion, integration, and full participation of the individuals.⁶⁷ The 1998 amendments to the Rehabilitation Act emphasized Congress’s goal of “integrated settings” for people with disabilities. This timeline contradicts the letter’s allegation that the Rehabilitation Services Administration created a definition of “integrated settings” in its regulations implementing WIOA. As mentioned previously, Congress recognized “integrated settings” as early as the ADA in 1990 and WIA in 1998, along with the United States Supreme Court’s 1999 decision in *Olmstead*.

Additionally, in 2001, the Secretary of Education included the phrase “integrated setting” in its definition of “employment outcome” and required that all employment outcomes in the Vocational Rehabilitation program be in integrated settings under § 361.5(b)(16).⁶⁸ That year, the Department of Education’s 2001

regulations eliminated sheltered employment as an employment outcome, regulations which have remained in effect for sixteen years.⁶⁹

C. Congress's goal today – to achieve “competitive integrated employment”

In 2014, Congress found that people with disabilities continued to be underrepresented in the general workforce.⁷⁰ Through the passage of the Workforce Innovation and Opportunity Act of 2014 (WIOA), Congress declared its intent to improve employment opportunities for people with disabilities. Unlike past efforts which brought limited results, this time, Congress emphasized the achievement of jobs in the general workforce and defined “competitive integrated employment,”⁷¹ “employment outcome,”⁷² and “supported employment”⁷³ for the purpose of the Rehabilitation Act.

Next, Congress amended sections of the Rehabilitation Act to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society...and to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment.”⁷⁴ It established an Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities to study, and prepare findings, conclusions, and recommendations for the Secretary of Labor on ways to increase the employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities in competitive integrated employment, the use of the certificate program carried out under [29 U.S.C. §214(c)] for the employment of individuals with intellectual or developmental disabilities, or other individuals with significant disabilities, and ways to improve oversight of the use of such certificates.⁷⁵

Finally, Congress added Section 511 to the Rehabilitation Act entitled, “Limiting the Use of Subminimum Wages” stating “[n]o entity, including a contractor or subcontractor of the entity, which holds a special wage certificate as described in section 14(c) of the Fair Labor Standards Act of 1938 may compensate an individual with a disability who is age [twenty-four] or younger at a wage that is less than the Federal minimum wage unless [certain] conditions [are] met.”⁷⁶ Congress created these mandatory conditions to ensure that youth with disabilities have a meaningful opportunity to prepare for, obtain, maintain, advance in, or regain competitive integrated employment.

Accordingly, the Secretary of Education incorporated Congress's definitions into its implementing regulations.^{77,78} In adopting Congress's definition of “employment outcome,” the Department of Education required that all employment outcomes achieved through the Vocational Rehabilitation program be in competitive integrated employment or supported employment, thus disqualifying previously recognized employment goals like homemakers and unpaid family workers from the Vocational Rehabilitation program.⁷⁹

1. Congress created two exceptions to the “employment outcome” standard

First, in instances when individuals with disabilities receiving supported employment services cannot achieve employment that satisfies all the criteria of “competitive integrated employment” or “supported employment,” Congress authorized the payment of non-competitive wages as long as the individual is working in an integrated setting on a temporary basis.⁸⁰ Under this exception, Congress did not intend to circumvent its overall goal and still expects the individual achieve competitive integrated employment at some point.⁸¹ Accordingly, the Department of Education implemented regulations authorizing work in integrated settings for non-competitive wages for up to twelve months.⁸²

Under the second exception, Congress authorized the Secretary of Education to exercise its discretion to determine appropriate vocational outcomes consistent with the Act.⁸³ Although this exception permits other vocational outcomes within the scope of the definition of “employment outcome,” it does not mandate the

Secretary of Education to incorporate new outcomes or to retain previously permitted ones.⁸⁴ Rather Congress authorized these discretionary acts as long as they lead to competitive integrated employment.⁸⁵

II. The AbilityOne program currently does not satisfy Congress's goal to achieve competitive integrated employment or its exceptions

The letter highlighted a direct conflict between Congress's intent under the Rehabilitation Act as amended by WIOA and the AbilityOne program. It stated that the Frequently Asked Questions document on the Rehabilitation Services Administration's website reiterates three criteria that disqualify an employer from state referrals and that these criteria are unique to the AbilityOne program.⁸⁶ Yet, these three disqualifying criteria are consistent with Congress's goals under WIOA.

Under the AbilityOne program, noncompetitive government contracts are awarded to "qualified nonprofit agencies for the blind or other severely disabled."⁸⁷ "Qualified nonprofit agenc[ies] for the blind or other severely disabled" are "agenc[ies] operated in the interest of blind or severely disabled individuals that in the production of products and provision of services employs blind or other severely disabled individuals for at least 75 percent of the hours of direct labor."⁸⁸ Congress explicitly excluded "supervision, administration, inspection, or shipping" from the definition of "direct labor."⁸⁹ In interpreting these statutes, courts have concluded that the AbilityOne program primarily focuses on providing the blind and others with severe disabilities with a "sheltered environment" and discourages advancement into managerial opportunities.⁹⁰ In other words, AbilityOne mainly serves people with disabilities.

The letter also stated that the AbilityOne program continues to operate under a mandated direct labor-hour ratio of persons with disabilities.⁹¹ This 75 percent direct labor requirement, as stated in the current statute and in the letter, is inherently incompatible with WIOA because the work settings are disproportionately filled with employees with disabilities. These settings cannot be considered integrated. Rather than incentivize work in the community, the direct labor ratio requires large-scale retention of employees with disabilities in majority-disability workplaces.⁹²

The letter stated that the AbilityOne program continues to receive allowances under the Fair Labor Standards Act for compensatory subminimum wages.⁹³ Under Congress's new definition of "supported employment," people with disabilities cannot be paid subminimum wages unless the employer is integrated. As previously noted, AbilityOne is not integrated.⁹⁴ Therefore, the program cannot simultaneously pay subminimum wages and receive support under the Rehabilitation Act, including referrals.

Likewise, the AbilityOne program does not satisfy the first exception enacted by Congress because the program is not intended to be temporary. It also does not have a goal to achieve competitive integrated employment which could trigger the Secretary of Education to exercise its discretion and permit employment in the AbilityOne program under the second exception. Just as the Secretary of Education previously exercised its discretion to disqualify employment goals like homemakers and unpaid family workers from the Vocational Rehabilitation program because these goals could not satisfy Congress's definition of employment outcomes, it can exercise this same discretion to disqualify the AbilityOne program. Therefore, although these three disqualifying criteria are not explicitly included in the WIOA law,⁹⁵ they are consistent with the law's definition and limited exceptions to "employment outcome" and further Congress' clear intent for competitive integrated employment.

Additional arguments support the position that the AbilityOne program is not an employment outcome Congress intended. In an independent analysis, the Government Accountability Office (GAO) found "the participants of the [AbilityOne] program perform work activities that require less skill and experience."⁹⁶ Congress also recognized that the AbilityOne program leads to segregated employment.⁹⁷ Finally and most

recently, even the AbilityOne Commission declared that its program required improvements to the quality of employment and wages for its workers with disabilities in order to stay viable.⁹⁸

III. Congress should amend the AbilityOne program so that it is consistent with the overall goals and purpose of the Rehabilitation Act, as amended by WIOA, to achieve competitive integrated employment

The letter stated that the RSA's three disqualifying criteria have resulted in the AbilityOne organizations experiencing difficulty in placing individuals in jobs around the country.⁹⁹ This improperly implies that the problem stems from WIOA's implementing regulations when the real issue is that the current statutes governing AbilityOne effectively make integration of their workplaces impossible. Even the AbilityOne Commission acknowledged its governing statutes are outdated.¹⁰⁰ It further recognized that its program cannot meet Congress's goal to achieve competitive integrated employment under the Rehabilitation Act as amended by WIOA.¹⁰¹ The Advisory Committee on Increasing Competitive and Integrated Employment (Advisory Committee) provided additional support. In its final report, the Advisory Committee recommended several actions Congress should take in order to align the AbilityOne program with modern federal disability law and policy goals.¹⁰² Therefore, the solution to fix this problem does not lie in the hands of the Secretary of Education, but rather the hands of Congress to improve the AbilityOne program so that it can meet Congress's goals of today, that is, to achieve competitive integrated employment. With WIOA, federal disability laws, and AbilityOne all in effect simultaneously, the federal legal framework governing employment of people with disabilities will remain contradictory.¹⁰³

IV. Concluding Remarks

The undersigned disability organizations thank you for the opportunity to share our rationale for objecting to any amendments to the Department of Education's implementing regulations under WIOA with respect to the definition of competitive integrated employment. We believe the current regulations and RSA's FAQ are necessary to facilitate Congress's goal to achieve competitive integrated employment for people with disabilities. Likewise, state policies disqualifying the AbilityOne program from referrals are consistent with the goals of WIOA, other federal disability laws, and the United States Supreme Court's decision in *Olmstead* which require that states have a duty to administer services, programs, and activities in the most integrated settings. Because the AbilityOne program currently is not integrated as mandated by its 75 percent direct labor ratio, it does not satisfy Congress's goal of an employment outcome. We therefore suggest that a more appropriate solution to the concerns raised in the letter to you is for Congress to amend the statutes governing AbilityOne so that it too facilitates the achievement of competitive integrated employment for people with disabilities.

If you have any questions, or would like additional information, please contact Mark Riccobono, President of the National Federation of the Blind, by phone at (410) 659-9314, or by email at officeofthepresident@nfb.org.

Sincerely,

American Association of People with Disabilities
Association of People Supporting Employment First
Association of Programs for Rural Independent Living
Association of University Centers on Disability
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Public Representation
Collaboration to Promote Self-Determination
Disability Power and Pride

National Federation of the Blind

*Institute for Educational Leadership
National Association of the Deaf
National Coalition for Mental Health Recovery
National Council on Independent Living
National Down Syndrome Congress
National Federation of the Blind
National Organization of Nurses with Disabilities
Not Dead Yet
TASH
United Spinal Association*

V. Guidance Documents issued by the Office for Special Education Programs Critical in Assisting Parents, Advocates, and Professionals in Ensuring that Blind Students Receive a “Free Appropriate Public Education.”

The following list of documents is not intended to be, and should not be construed as, being an exhaustive resource of useful documents the Department has issued, but rather simply serves to highlight particularly relevant guidance the Department has issued which directly impacts the education of blind students. The Department should maintain these documents as currently drafted to ensure that blind students continue to receive a “free and appropriate public education” as required by law.

Letter to Educators Regarding Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools
November 12, 2014

Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools
November 12, 2014

Dear Colleague Letter on Braille
June 19, 2013

Electronic Book Reader Dear Colleague Letter
June 29, 2010

Electronic Book Reader Dear Colleague Letter: Questions and Answers about the Law, the Technology, and the Population Affected
June 29, 2010

The National Federation of the Blind appreciates the careful consideration of the comments herein provided, and we look forward to our continued partnership with the United States Department of Education to ensure that all blind Americans are equipped with the education, rehabilitation training, and employment opportunities necessary to live the lives we want.

Sincerely,



Mark A. Riccobono, President
National Federation of the Blind

National Federation of the Blind

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- ¹ United States Census Bureau, American Community Survey, Cornell University. “The percentage of non-institutionalized persons aged 21-64 years with a visual disability in the United States who were employed full-time/full-year in 2015.” <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=4>
- ² 34 C.F.R. § 300.7(c)(13)
- ³ 34 C.F.R. § 300.8(c)(13)
- ⁴ 34 C.F.R. § 300.306(a)(1)
- ⁵ Georgia Department of Education, Division of Special Education and Supports. “Visual Impairment and Blindness Rules and Regulations.” (Appendix L) http://archives.doe.k12.ga.us/DMGetDocument.aspx/160-4-7-.05_Eligibility_3-31-10.pdf?p=6CC6799F8C1371F652A505DFC2E6E9873664C9C07475C448B6F4C484C7DA08A6&Type=D
- ⁶ Florida Department of Education “Rule 6A-6.03014, F.A.C.” https://www.flrules.org/gateway/notice_Files.asp?ID=19270328
- ⁷ Kentucky Department of Education., “Special Education: KY Evaluation/Eligibility Determination” <https://education.ky.gov/districts/tech/sis/Documents/Standard->
- ⁸ United States Department of Education, Office for Special Education Programs., “Elegibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act.” <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html>
- ⁹ United States Department of Education, Office for Special Education Programs. “Dear Colleague Letter on Free and Appropriate Public Education (FAPE).” <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html>
- ¹⁰ Kennedy, Jennifer., “Three Key Elements of Structured Discovery Cane Travel,” July 22, 2013, <http://blog.pdrdb.com/3-key-elements-of-structured-discovery-cane-travel/>
- ¹¹ See <https://nfb.org/national-federation-blind-and-louisiana-tech-launch-national-reading-media-assessment>
- ¹² Castellano, Carol., “The National Reading Media Assessment.” Future Reflections, Winter 2013. <https://nfb.org/images/nfb/publications/fr/fr32/1/fr320102.htm>
- ¹³ National Reading Media Assessment., “Rationale for the Assessment.” <https://www.nfbnrma.org/admin/users/about.php>
- ¹⁴ Robertson, Casey W., “Teaching the Legislature to Believe in Blind Students.” July 17, 2013. <http://blog.pdrdb.com/teaching-the-legislature-to-believe-in-blind-students/>
- ¹⁵ Robertson, Casey W. “Even Four Years Later, Mississippi Students Benefit from the NRMA.” February 10, 2016. <http://blog.pdrdb.com/even-4-years-later-mississippi-students-benefit-from-the-nrma/>
- ¹⁶ United States Department of Education, Office for Special Education Programs., “Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act.” <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html>
- ¹⁷ See <http://blindmerchants.org/about/>
- ¹⁸ 34 C.F.R. § 395.1
- ¹⁹ 34 C.F.R. 395.1
- ²⁰ 34 C.F.R. 395.1
- ²¹ Case No. R/S 16-09., Texas v. Fort Sam Houston, February 28, 2017, Case No. R/S 15-15., Kansas Department of Children and Families v. The Department of the Army, Fort Riley, January 10, 2017
- ²² See <https://www.gpo.gov/fdsys/pkg/FR-2006-02-03/pdf/E6-1513.pdf>
- ²³ *NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001)
- ²⁴ *NISH v. Rumsfeld*, 348 F.3d 1263 (10th Cir. 2003)
- ²⁵ 20 U.S.C. § 107(b)
- ²⁶ 2 C.F.R. §200.456 and §2200.474
- ²⁷ 2 C.F.R. §200.454
- ²⁸ Jessica Wichmann, *The Horrors of Atalissa, Nat'l Fed'n Blind* (Mar. 10, 2014, 4:55 PM), <https://nfb.org/blog/vonb-blog/horrors-atalissa>.
- ²⁹ 29 U.S.C. § 214(c); 29 C.F.R. § 525.5 (2014).
- ³⁰ Act of June 25, 1938, ch. 697, 52 Stat. 1196 (“the Wagner–O’Day Act”).
- ³¹ 41 U.S.C. §§ 8501-8506 (2011).
- ³² *Id.*
- ³³ 41 U.S.C. § 8503(a)(1)(A)-(B) (2011).

³⁴ See, e.g., H.R. Rep. No. 105-635 (1998); 134 Cong. Rec. E1308 (daily ed. Apr. 22, 1988) (statement of Rep. Tony Coelho) (“[W]hen prejudice dictates that the handicapped can be productively employed only in separate sheltered workshops . . .”).

³⁵ 42 U.S.C. § 12101(a)(2)-(3) (2008).

³⁶ 29 U.S.C. § 701(a)(5) (2014).

³⁷ Zoë Brennan-Krohn, Employment for People with Disabilities: A Role for Anti-Subordination, 51 Harv. C.R.-C.L. L. Rev. 239, 243 (2016).

³⁸ 29 U.S.C. § 701 *et seq.* (The Rehabilitation Act of 1973 is known as the first civil rights act intended to protect and promote persons with disabilities, and prevent discrimination in programs receiving federal funding); Thomas B. Heywood, State-Funded Discrimination: Section 504 of the Rehabilitation Act and Its Uneven Application to Independent Contractors and Other Workers, 60 Cath. U. L. Rev. 1143, 1151 (2011); See 29 U.S.C. § 791 (2014) (providing affirmative action and nondiscrimination protection for disabled persons in federal government positions); *Id.* at § 793 (mandating affirmative action in regards to federal contracts in excess of \$10,000); *Id.* at § 794 (precluding discrimination in any program or activity receiving federal funds); *Id.* at § 794a (providing remedies for violations of § 791 and § 794 of this Act comparable to those available under the Civil Rights Act of 1964).

³⁹ 42 U.S.C. § 12101 *et seq.*

⁴⁰ 42 U.S.C. § 12132 (1990); 29 U.S.C. § 794(a) (2015).

⁴¹ See 42 U.S.C. § 12101(b)(1) (2008).

⁴² 527 U.S. 581, 596 (1999).

⁴³ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999) (emphasis added).

⁴⁴ See 42 U.S.C. § 12182(b)(1)(B) (1990).

⁴⁵ *Olmstead*, 527 U.S. at 600.

⁴⁶ It should be noted that subsequent to the enactment of WIOA, the DOJ published guidelines for state and local governments’ employment service systems in 2016 which can be found at https://www.ada.gov/olmstead/olmstead_guidance_employment.pdf (stating that “in the context to state employment services, the ‘most integrated setting’ requires the provision of services and supports in an integrated setting that enables an individual with a disability to work in a typical job in the community like individuals without disabilities.”)

⁴⁷ See *Olmstead: Community Integration for Everyone - Home Page*, ADA.gov, <http://www.ada.gov/olmstead/index.htm> (last visited August 10, 2017).

⁴⁸ U.S. Department of Justice Civil Rights Division, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, (June 22, 2011), available at https://www.ada.gov/olmstead/q&a_olmstead.htm#_ftnref11 (citing 28 C.F.R. pt. 35 app. A (2010)).

⁴⁹ *Id.*

⁵⁰ *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1201 (D. Or. 2012).

⁵¹ Complaint for Declaratory and Injunctive Relief, *United States v. State of Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS (D.R.I. June 13, 2013).

⁵² *Lane*, 841 F. Supp. 2d at 1201.

⁵³ United States’ Complaint in Intervention at 84, *Lane v. Kitzhaber*, Case No. 3:12-cv-00138-ST (D. Or. March 27, 2013).

⁵⁴ *Id.* at 76.

⁵⁵ Settlement Agreement, *Lane v. Brown*, Case No. 3:12-cv-00138-ST (Sept. 8, 2015), available at http://www.ada.gov/olmstead/documents/lane_sa.pdf, archived at perma.cc/Y8R7-R7ME.

⁵⁶ Complaint for Declaratory and Injunctive Relief, *United States v. Rhode Island and City of Providence*, Case No. 1:13-cv-0042-L-PAS at 110-112 (D.R.I. June 13, 2013), <http://www.ada.gov/olmstead/documents/ri-providence-complaint.pdf>, archived at <http://perma.cc/TCN8-BEUK>.

⁵⁷ *Id.* at 67, 83.

⁵⁸ Interim Settlement Agreement at 5, Department of Justice, City of Providence, State of Rhode Island, Interim Settlement Agreement, available at <http://www.ada.gov/olmstead/documents/ri-providence-interim-settlement.pdf>, archived at <http://perma.cc/QVR8-VL2G>.

⁵⁹ *Id.* at 9. (The parties later entered into a consent decree reinforcing obligations under the original settlement.)

⁶⁰ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 1-3.

⁶¹ See, e.g. *Discrimination Prohibited*, 45 C.F.R. § 84.4(b)(v)(2)(2005).

⁶² See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

⁶³ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 2, ¶1, lines 1-2.

⁶⁴ *Infra* note 63.

⁶⁵ *But see Olmstead*, 527 U.S. at 596 (emphasis added).

⁶⁶ The Workforce Investment Act of 1998, Pub.L. 105–220 § 401, Aug. 7, 1998.

⁶⁷ 29 U.S.C. § 701(2)(c)(3)(1998), *See also* 29 U.S.C. § 720(a)(3)(B) (stating “Individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings”).

⁶⁸ State Vocational Rehabilitation Services Program, 66 FR 7250-01 (stating “[t]his action is necessary to reflect the purpose of Title I of the Rehabilitation Act of 1973, as amended (Act), which is to enable individuals with disabilities who participate in the VR program to achieve an employment outcome in an integrated setting”).

⁶⁹ State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01.

⁷⁰ *See e.g.* 29 U.S.C. § 701(a)(1)-(7) (2014).

⁷¹ 29 U.S.C. § 705(5) (2014).

⁷² *Id.* at § 705(11)(A)-(C).

⁷³ *Id.* at § 705(38).

⁷⁴ *See also* 29 U.S.C. § 701(b)(1)-(2)(2014).

⁷⁵ 29 U.S.C. § 795n(f)(1)-(3) (2014).

⁷⁶ 29 U.S.C. § 794g(a)(1)-(2) (2015) (internal citations omitted).

⁷⁷ *Id.*

⁷⁸ State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01 (stating “[t]he foundation of the VR program is the principle that individuals with disabilities, including those with the most significant disabilities, are capable of **achieving** high quality, competitive integrated employment when provided the necessary services and supports”).

⁷⁹ *Id.*

⁸⁰ 29 U.S.C. 705(38)(2014) (emphasis added).

⁸¹ *Id.*

⁸² 34 C.F.R. § 363.1.

⁸³ 29 U.S.C. § 705(11)(C) (2014).

⁸⁴ *See* State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 81 FR 55630-01.

⁸⁵ *See* 29 U.S.C. § 705(11)(C) (2014).

⁸⁶ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 3-5.

⁸⁷ 41 U.S.C. § 8503 (2011).

⁸⁸ *Id.* § 8501(6)-(7) (emphasis added).

⁸⁹ *Id.* § 8501(3)(B).

⁹⁰ *See NISH v. Cohen I*, 247 F.3d 197, 201 (4th Cir. 2001) (citing *Barrier Indus. v. Eckard*, 584 F.2d 1074, 1076 (D.C. Cir. 1978)) (“*NISH II*”).

⁹¹ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 7-8.

⁹² Zoë Brennan-Krohn, *Employment for People with Disabilities: A Role for Anti-Subordination*, 51 *Harv. C.R.-C.L. L. Rev.* 239, 248 (2016).

⁹³ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 6-7.

⁹⁴ *Supra* note 63.

⁹⁵ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 8-9.

⁹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-3, DEFENSE CONTRACTS: CONTRACTING FOR MILITARY FOOD SERVICES UNDER THE RANDOLPH-SHEPPARD AND JAVITS-WAGNER-O'DAY PROGRAMS (2007), *available at* <https://www.gao.gov/products/GAO-08-3>, p. 11, ¶ 1, lines 3-4.

⁹⁷ *Supra* note 8.

⁹⁸ *See infra* notes 69-70.

⁹⁹ Letter from Representative Kristi Noem *et al.* to Secretary DeVos (July 28, 2017) at 1, ¶2, lines 10-11.

¹⁰⁰ U.S. AbilityOne Commission, *Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities* (March 18, 2016), p.1, ¶5, lines 6-7, *available at* <http://www.abilityone.gov/commission/documents/US%20AbilityOne%20Commission%20Declaration%2018March2016%20Final.pdf> (stating “the Commission recognizes that Federal policies have changed since the Javits-Wagner-O'Day Act was passed into law in 1971”).

¹⁰¹ *Id.* at 1, ¶5, lines 5-7.

¹⁰² ADVISORY COMMITTEE ON INCREASING COMPETITIVE AND INTEGRATED EMPLOYMENT FOR PEOPLE WITH DISABILITIES, FINAL REPORT TO THE HONORABLE THOMAS E. PEREZ, UNITED STATES SECRETARY OF LABOR, THE UNITED STATES SENATE, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, THE UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON EDUCATION AND THE WORKFORCE (2016), *available at* https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf.

¹⁰³ See Zoë Brennan-Krohn, Employment for People with Disabilities: A Role for Anti-Subordination, 51 Harv. C.R.-C.L. L. Rev. 239, 245 (2016).